10-30-2012

Sanders v. Board of Trustees Appellant's Reply Brief Dckt. 40013

IN THE SUPREME COURT FOR THE STATE OF IDAHO

TERRI M. SANDERS Plaintiff, vs. BOARD OF TRUSTEES OF THE MOUNTAIN HOME SCHOOL DISTRICT NO. 193 Defendants.	Supreme Court Case No. 40013-2012 District Court Case No. CV-2009-315 APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL

APPEALED FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

HONORABLE LYNN NORTON, DISTRICT JUDGE

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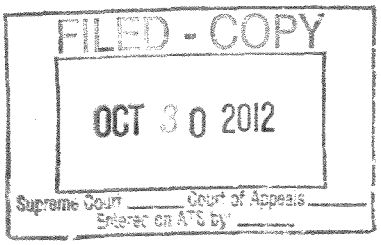

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I. REPLY IN SUPPORT OF APPELLANT'S BRIEF

Sanders contends that this Court has determined that *I.C.* § 12-117 is the exclusive source of attorney fees in this case, and contends that there are at least 14 cases in which this Court has stated that *I.C.* § 12-117 is exclusive. *Respondent's Brief*, p. 3. What Sanders fails to acknowledge is that of the 14 cases she cites (all of which have been previously cited and summarized by the Board), not one of those cases involves a breach of employment contract like is at issue in this case. Sanders further ignores the numerous cases that allow attorney fees under *I.C.* § 12-120(3) where a governmental entity prevails on a breach of contract claim, including employment claims. *See* Clark v. State, Dept. of Health & Welfare, 134 Idaho 527, 532, 5 P.3d 988, 993 (2000) (allowing attorney fees under *I.C.* § 12-120(3) to the State after prevailing on a breach of employment contract claim); *Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002) (allowing attorney fees to a school district Board of Trustees when prevailing on a breach of employment contract claim); *Huyett v. Idaho State Univ.*, 140 Idaho 904, 911, 104 P.3d 946, 953 (2004) (state university entitled to attorney fees under *I.C.* § 12-120(3) for prevailing on employment contract claim); *Sadid v. Idaho State Univ.*, 151 Idaho 932, 942, 265 P.3d 1144, 1154 (2011) (same)[1]; *Noak v. Idaho Dept. of Correction*, 152 Idaho 305, 271 P.3d

[1] Plaintiff Sanders argues, in a footnote, that *Sadid* does not support the contention that *I.C.* § 12-120(3) is available to the Board, ostensibly because *I.C.* § 12-117 does not apply to Idaho State University. *Respondent's Brief*, p. 21 (fn. 5) (citing *Horne v. Idaho State Univ.*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003)). It should be noted that *Horne* was decided in 2003, and § 12-117 was amended in 2010. *See* 2010 H.B. 421, § 1. As it now reads, § 12-117 applies to "state agencies" and "political subdivisions". *I.C.* § 12-117(1). A "political subdivision" means "a city, a county or any taxing district", and a "state agency" means "any agency as defined in section 67-5201, Idaho Code." *I.C.* § 12-117(4). The definition for state agency in *I.C.* § 67-5201, a statute which also has been revised since 2003, includes "each state board, commission, department or officer authorized by law to make rules or to determine contested cases." *I.C.* § 67-5201(2). Idaho State University is clearly an entity established by statute, *see I.C.* § 33-3001, and is statutorily given the power to "adopt rules and regulations." *I.C.* § 33-3006(1). The Board of Trustees of ISU is the State Board of Education. *I.C.* § 33-3003. The State Board of Education certainly fits the definition of "Agency" in *I.C.* § 67-5201 (and therefore fits the definition of "state agency" in *I.C.* § 12-117). Therefore, Sander's argument that *Sadid* does not apply to this present case holds little weight. The result in *Sadid*

703, 712 (2012), reh'g denied (Mar. 12, 2012) (Idaho Department of Corrections awarded fees under *I.C.* § 12-120(3) for prevailing on contract claim).

While there are numerous cases holding that *I.C.* § 12-117 is exclusive to those entities to which it applies, Sanders can cite to no case holding that, as a matter of law, *I.C.* § 12-117 is exclusive over *I.C.* § 12-120(3) when there is a breach of contract claim stated in the Complaint. There is no case which holds so as a matter of law. Further, as mentioned above, there are also numerous cases allowing fees under *I.C.* § 12-120(3) to "political subdivisions[2]" or "state agencies[3]" who prevail on contract claims. In the absence of a case absolutely holding that *I.C.* § 12-120(3) is unavailable to the Board, and in light of so many similar cases allowing for attorney fees under *I.C.* § 12-120(3) to entities which prevail on breach of contract claims (and which could conceivable fall under the definitions of "state agency" or "political subdivision" in *I.C.* § 12-117), the Board contends that Judge Norton abused her discretion by refusing to even consider an award of attorney fees under *I.C.* § 12-120(3). As discussed in more detail below, none of Sanders' arguments required Judge Norton or require this court to deny attorney fees to the Board under *I.C.* § 12-120(3). The Board requests that this Court reverse Judge Norton's ruling on the matter, and award reasonable attorney fees to the Board in both the underlying case and in this appeal.

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applies to this case because 1) Idaho State University is an entity to which *I.C.* § 12-117 clearly applies, and 2) this Court did not hold in *Sadid* that *I.C.* § 12-117 was not applicable to Idaho State University. Therefore, to the extent fees were awarded to Idaho State University under *I.C.* § 12-120(3) for prevailing on a breach of contract claim, they should be awarded to the Board in this case.

[2] In *Willie*, the school district constituted a political subdivision as defined by *I.C.* § 12-117.

[3] In *Noak*, the State Department of Corrections fits the definition of a "state agency" (*see I.C.* § 67-5201), as it is "an executive department of state government" (*see I.C.* § 20-201) with the power to make rules (*see I.C.* § 20-209(4)).

A. CONFLICT OF THE STATUTES.

Sanders argues that *I.C.* §§ 12-117 and 12-120(3) conflict. *Respondent's Brief*, pp. 5 – 6. The essence of her argument is in part that the statutes conflict because they both contain a "disclaimer that they will apply unless the law provides otherwise." *Respondent's Brief*, p. 6. Indeed, both statutes contain the phrase "unless otherwise provided by law" or "unless otherwise provided by statute"; however, in actually reading the statute, it is clear that these phrases do not create a conflict.

Before this court can determine whether a conflict occurs, the court should attempt to construe the statutes at issue harmoniously. In Cox v. Mueller, 125 Idaho 734, 874 P.2d 545 (1994), in discussing an apparent conflict between *I.C.* § 12-120 and *I.C.* § 5-335, the Supreme Court stated

> Because I.C. § 12-120(1) requires a party to specify the maximum amount of damages claimed and I.C. § 5-335 forbids a personal injury plaintiff from claiming a specific amount of damages, the two statutes admittedly are difficult to reconcile. However, it is axiomatic that this Court must assume that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. *Sutherland Statutory Construction*, § 51.02 (Norman J. Singer ed. 1992). In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. *Id.* Therefore, statutes relating to the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible. *Id.*; Sampson v. Layton, 86 Idaho 453, 457, 387 P.2d 883, 885 (1963)

Cox, 125 Idaho at 736, 874 P.2d at 547. As is indicated in Cox, the Court does not lightly construe statutes to be read in conflict, and should attempt to construe statutes in harmony.

There is no need to construe *I.C.* §§ 12-117 and 12-120 such that they conflict. There are many reasonable readings of the statutes under which they do not conflict. For example, the applicable language of *I.C.* § 12-117 states:

> (1) *Unless otherwise provided by statute*, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1) (emphasis added). The phrase "unless otherwise provided by statute" occurs at the beginning of the sentence, indicating that what is to follow only applies if there is no other statute providing a different recourse. In this case, the language following "unless otherwise provided by statute" would be the applicable attorney fee statute if there is no other available (and applicable) source of attorney fees. The language in *I.C.* § 12-120(3) reads differently. It states:

> (3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction *unless otherwise provided by law*, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. § 12-120(3) (emphasis added). This language generally states that in any contract action, attorney fees are to be awarded to the prevailing party (including political subdivisions, which are specifically defined to be included within the statute's scope). However, this statute, being specifically limited to certain types of actions (i.e. contract or commercial transactions), contains a list of those actions to which it applies. The phrase "unless otherwise provided by law" follows the list of categories to which it applies. Therefore, the logical reading of the phrase is that "unless otherwise provided by law", attorney fees are available when suing on open accounts, accounts stated, notes, bills, negotiable instruments, etc.

Logically, in the myriad of statutes dealing these specific issues, the legislature could indicate that attorney fees are not to be awarded on such actions and have neglected (or chosen

not to) modify *I.C.* § 12-120(3) in order to remove its applicability. For example, the Idaho Wage Claim Act allows for attorney fees to prevailing plaintiffs. *See I.C.* § 45-615(2). Though claims for wages under the Wage Claim Act appear to fall within the scope of *I.C.* § 12-120(3) (as failure to pay wages is a breach of an employment or service contract, and thus within the scope of § 12-120(3)), the Wage Claim Act's specific attorney fee statute could easily be seen to limit an award of attorney fees to plaintiffs only (which is different from the general provisions of *I.C.* § 12-120(3)). Similarly, under the Idaho Consumer Protection Act (claims under which could also conceivably fall under the scope of *I.C.* § 12-120(3)), attorney fees are awarded to plaintiffs if they prevail, but to defendants only if "the plaintiff's action is spurious or brought for harassment purposes." *I.C.* § 48-608(5). Thus, in both of these types of claims which could also fall under the scope of *I.C.* § 12-120(3), the statutes do not automatically provide for attorney fees to the prevailing party in the way that *I.C.* § 12-120(3) does. The "unless otherwise provided by law" language included *I.C.* § 12-120(3) applies only to the type of claim being litigated, not the parties involved. Therefore, these almost identical phrases in *I.C.* § 12-120(3) and *I.C.* § 12-117 do not result in a conflict, and the statutes can easily be harmonized together.[4]

The plain language of these statutes also results in a conclusion that there is no conflict. Sanders admits that *I.C.* § 12-120(3)

> applies, by its own terms, to many types of parties, including individuals such as Appellee Terri Sanders, corporations, partnerships, associations and political subdivisions. Undoubtedly, by its plain language . . . it would provide for a fee award to prevailing party [sic] who brought suit against a school district or other political subdivision, as well as to a school district or political subdivision who prevailed against any other type of party.

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[4] These statutes should not be interpreted to conflict "merely because an astute mind can devise more than one interpretation" of them. *See* Matter of Permit No. 36-7200 in Name of Idaho Dept. of Parks & Recreation, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992), abrogated by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011).

Respondent's Brief, p. 7. In other words, the Board, as prevailing party, would be entitled to attorney fees under *I.C.* § 12-120(3) if Plaintiff was not trying to limit the applicability of the statute to school districts. In fact, the only issue which Plaintiff can point to as a conflict is that the standards for awarding attorney fees under *I.C.* § 12-120(3) and *I.C.* § 12-117 are different (i.e. awards under § 12-120(3) are automatic to the prevailing party, whereas awards under § 12-117 are allowed only when the non-prevailing party brought or defended the case without basis in law or fact). *Respondent's Brief*, p. 7. This argument might create an issue if there were a source of law stating that both *I.C.* §§ 12-120(3) and 12-117 could not both apply to a single case, but Sanders cannot point to such authority. In fact, there is no specific holding in any case which makes such a statement. Plaintiff repeatedly points to *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 226 P.3d 1277 (2010), reh'g denied (Mar. 17, 2010), trying to show that that case holds *I.C.* §§ 12-120(3) and 12-117 are exclusive and may not both apply to the same case. However, *Potlatch* says nothing of the sort. *Potlatch*, and every other case discussing the "exclusivity" of *I.C.* § 12-117 to school districts or other political subdivisions, only holds that § 12-117 is exclusive as to *I.C.* § 12-121. *Potlatch*, 148 Idaho at 635, 226 P.3d at 1282. This makes sense because *I.C.* § 12-117 and *I.C.* § 12-121 have the same standard for determining whether attorney fees are awardable. Because *I.C.* § 12-120(3) has a different standard, and applies to specific types of cases, it also may apply alongside *I.C.* § 12-117. *See, e.g.*, *Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011) (no discussion of exclusivity, even though fees were requested under *I.C.* §§ 9-344, 12-117, 12-120(3), and 12-121); *Nation v. State, Dept. of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007) (no discussion of exclusivity, even though fees were requested under 42 U.S.C.

§ 1988, and *I.C.* §§ 12-117, 12-120, 12-120(3), and 12-121).

In other circumstances, *I.C.* §§ 12-120 and 12-117 have been construed harmoniously. For example, in *Scott Beckstead Real Estate Co. v. City of Preston,* 147 Idaho 852, 216 P.3d 141 (2009), the City prevailed on summary judgment against a developer on a claim related to installation of a water line. *Id.*, 147 Idaho at 853, 216 P.3d at 142. With regard to attorney fees, the Supreme Court stated

> After judgment was entered in its favor, the City filed a "Motion for Costs and Attorney Fees." In its supporting memorandum, it requested an award of attorney fees under Idaho Code §§ 12–117, 12–120, and 12–121. The district court held that the City was the prevailing party, but it denied the City's request for an award of attorney fees. In doing so, it addressed Idaho Code §§ 12–117 and 12–121, but it did not consider the applicability of Idaho Code § 12–120.
>
> Idaho Code § 12–120(1) provides that "in any action where the amount pleaded is twenty-five thousand dollars ($25,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees." The amount pleaded in this case was less than $25,000.
> . . .
>
> In its motion for attorney fees, the City requested an award pursuant to "§ 12–117, § 12–120, and § 12–121, Idaho Code." In its supporting memorandum, it wrote:
>
> > § 12–120(1) provides in any action for less than $25,000.00[5], "there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees." There is no requirement under § 12–120 that the Court find the Plaintiff pursued the case frivolously, unreasonably, or without foundation, as set forth in Rule 54(e)(1) I.R.C.P. That requirement applies only to awards of attorney fees and costs pursuant to § 12–121, Idaho Code. The provisions of this Section are mandatory. . . .
>
> In its memorandum, the City adequately identified Idaho Code § 12–120(1) as a statute under which it was requesting an award of attorney fees. *The district court denied the City's request for an award of attorney fees without considering the applicability of that statute. In doing so, it erred.* The City was entitled to an

[5] That amount is now $35,000. *See I.C.* § 12-120(1).

> award of attorney fees under that statute.
> . . .
>
> The City requests an award of attorney fees on appeal pursuant to Idaho Code §§ 12–117, 12–120(1), and 12–121. Because the City is the prevailing party on appeal, it is entitled to an award of attorney fees under Idaho Code § 12–120(1).

Scott Beckstead Real Estate Co., 147 Idaho at 856-57, 216 P.3d at 145-46 (emphasis added). Though Scott Beckstead Real Estate Co. dealt with *I.C.* § 12-120(1) instead of *I.C.* § 12-120(3), that does not alter the applicability of its holding to this case. The City of Preston clearly falls within the definition of "political subdivision" of *I.C.* § 12-117(5)(b), and therefore, under Sanders' analysis, should only be allowed attorney fees under § 12-117. However, the Supreme Court, construing *I.C.* §§ 12-120 and 12-117 together, held that it was error for the lower court to refuse a request for attorney fees to the City under *I.C.* § 12-120 when that section applied. To apply Sanders' analysis would be to deprive political subdivisions of attorney fees under not only *I.C.* § 12-120(3), but also subsections (1), (4), (5), and (6) of that statute. Clearly, this is not the result intended by the language of the statutes, nor should the Court be eager to read *I.C.* §§ 12-120 and 12-117 in conflict so as to prevent the application of any subsection of 12-120 to various political subdivisions.

A second important point to be taken from the Beckstead case is that if *I.C.* § 12-117 were truly the exclusive source of attorney fees for cities and other political subdivisions (regardless of the type of claim), then the Court should have looked to *I.C.* § 12-117(5)[6] as the source for attorney fees in Beckstead, as opposed to looking at *I.C.* § 12-120(1).[7] *I.C.* § 12-

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[6] At the time Beckstead was handed down, *I.C.* § 12-117(5) and had a limit of $2,500 instead of $25,000. Pursuant to 2012 Idaho Laws Ch. 149, *I.C.* § 12-117(5) was renumbered as *I.C.* § 12-117(6).

[7] If *I.C.* § 12-117 was truly exclusive, the Beckstead Court should have stated that while the provisions of *I.C.* § 12-120(1) were met, the provisions of *I.C.* § 12-120(5) were not met, since the amount plead was less than $2,500, and should have denied fees under both sections. Instead, the Court determined that fees were available

117(5) then (and now, renumbered as *I.C.* § 12-117(6)) allowed that if the amount plead was less than a certain dollar amount ($2,500 in 2009, $25,000 now), the person had to satisfy both the requirements of *I.C.* §§ 12-120 and 12-117 in order to get fees under *I.C.* § 12-117. However, the *Beckstead* Court did not hold that a person could only get fees under *I.C.* § 12-117 if a city was a party to the lawsuit, and instead allowed the City of Preston to get fees under *I.C.* § 12-120(1). This would lead to the conclusion that then, as well as now (since the only language which was changed under *I.C.* § 12-117(5) was the dollar amount at question), *I.C.* §§ 12-117 and 12-120 were not exclusive of each other when both potentially applied to a case. If the Legislature had wanted to correct the *Beckstead* opinion to make it understood that *I.C.* § 12-117 was the only fee statute allowed when a political subdivision is a party to a case, it had full opportunity to do so in both 2010 and 2012 when *I.C.* § 12-117 was amended.[8] The legislature did not do so. This would lead to a conclusion that the *Beckstead* ruling was in line with the Legislature's understanding of both *I.C.* §§ 12-120 and 12-117, and that where § 12-120 applies, a political subdivision (including cities and school districts) may obtain fees under the applicable subsection of § 12-120.

As Sanders cannot point to a single case that specifically states *I.C.* § 12-117 is exclusive over *I.C.* § 12-120(3) when a school district or board is a party in a contract lawsuit, it makes little sense to say that the two statutes conflict. There is no general rule that only one fee statute may apply. In this case, both statutes could have applied. In ruling that *I.C.* § 12-120(3) was not an available source of attorney fees to the Board, Judge Norton abused her discretion, and her

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under § 12-120(1), regardless of compliance with § 12-117(5). Therefore, by their own terms, §§ 12-117 and 12-120 should be deemed to be both available if the situation merits.

[8] It also had the full opportunity to remove "the state of Idaho or political subdivision thereof" from the definition of "party" in *I.C.* § 12-120(3) when that statute was amended in 2012, but did not do so.

decision should be reversed.

B. EVEN IF THE STATUTES ARE IN CONFLICT, THE COURT SHOULD STILL DETERMINE THAT AN AWARD OF ATTORNEY FEES SHOULD BE ALLOWED UNDER I.C. § 12-120(3).

Next, Sanders attempts to confuse the Board's explanation of the applicability of *I.C.* §§ 12-117 and 12-120 to this case by referring to the "bilateral" or "one-sided" nature of the statutes. *See Respondent's Brief*, pp. 8 – 10. Sanders' explanation makes the situation considerably more complex than it needs to be. The Board contends that since there is no case or rule expressly holding that only one fee statute can apply to any given case, and because *I.C.* §§ 12-117 and 12-120 can be construed harmoniously, both can apply to this case. There are many cases holding that *I.C.* § 12-117 applies under certain circumstances (and is exclusive as to other general attorney fee statutes, such as *I.C.* § 12-121), and many cases holding that attorney fee awards are allowed to political subdivisions under *I.C.* § 12-120. Under Sanders' interpretation, the Court would have to disavow or overrule all cases allowing attorney fees to political subdivisions under any statute other than *I.C.* § 12-117. Under the Board's interpretation, no overruling is required. In a breach of contract case, both *I.C.* § 12-117 and § 12-120(3) can apply. Frankly, there is nothing in the two statutes which causes them to be so repugnant to each other that they must be deemed to conflict.

> Except where an act covers the entire subject matter of earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy that the two acts cannot, by a fair and reasonable construction, be reconciled and given effect or enforced concurrently.
>
> . . . Nonetheless, a conflict that is merely cosmetic or that relates to anything less than the operative legal concepts is not enough; there must be a clear repugnancy

between the two provisions.

73 Am. Jur. 2d Statutes § 278. The alleged conflict between *I.C.* §§ 12-120(3) and 12-117 (that both contain the "unless otherwise provided by law" language) is not so manifest or controlling that this Court need conclude there is an irreconcilable conflict.

However, to the extent that this Court does determine that there is a conflict, the Board contends that *I.C.* § 12-120(3) is still available to the Board as a source of attorney fees under the circumstances of this case. Sanders and the Board both agree that the appropriate canon of construction where statutes conflict is that the later or more specific statute should control. *See* *Johnson v. Boundary Sch. Dist. No. 101*, 138 Idaho 331, 335, 63 P.3d 457, 461 (2003); *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980). Plaintiff would have this Court conclude that *I.C.* § 12-117 is both older and more specific than *I.C.* § 12-120(3). The Board contends that this is incorrect.

It is not clear which of the two canons the Court will look at as prevailing (i.e. newer is more important than more specific, or vice versa), but in this case, the age issue is deceptive. The Board agrees that it does appear that *I.C.* § 12-120 was enacted by the legislature in 1970 (*see* S.L. 1970, ch. 44, § 1), whereas *I.C.* § 12-117 was enacted in 1984 (*see* S.L. 1984, ch. 204, § 1). However, this is not a case where two statutes are created and then remain unmodified for decades. Both of these statutes have been amended and added to repeatedly (as Plaintiff acknowledges[9]) since they were enacted. In fact, both statutes were amended as recently as the 2012 legislative session. During that session, the changes to *I.C.* § 12-117 became effective in March, 2012 (*see* S.L. 2012, Ch. 149, § 1), whereas the changes to *I.C.* § 12-120 became

[9] *See Respondent's Brief*, pp. 11 – 13.

effective in July, 2012 (*see* S.L. 2012, ch. 94).[10] Where two statutes are continually reaffirmed by the legislature by being added to, this canon of construction becomes less useful, as it becomes much more difficult to determine which statute prevails as "the more recent expression of legislative intent." *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980).

Alternatively, where neither statute is clearly the later statute, the Court looks to the specificity of the statutes.

> Where there is in the same statute a specific provision and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision; additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision rather than to the special one. This general rule is applicable only as an aid in ascertaining and giving effect to the legislative intent.
>
> Similarly, with respect to a conflict arising between a statute dealing generally with a subject and another dealing specifically with a certain phase of it, the specific legislation controls in a proper case. Moreover, statutes complete in themselves, relating to a specific subject, take precedence over general statutes or over other statutes that deal only incidentally with the same question. *It has also been said that when two statutes appear to conflict and cannot be reconciled, the provision later in the chapter prevails if it is more specific than the provision occurring earlier in the chapter*, while the more recent provision prevails if it is more specific than its predecessor.
>
> If one statutory section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general.

73 Am. Jur. 2d Statutes § 161 (emphasis added). Based on this summary, *I.C.* § 12-120(3) should

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[10] Utilizing Plaintiff's logic (*see Respondent's Brief*, p. 11), the reaffirmation of and amendments to *I.C.* § 12-120 taking effect in July, 2012, would make it the later statute.

apply. It is more specific as to the types of cases to which it applies (contracts vs. general cases involving political subdivisions) and it is later in the chapter.

Sanders contends that *I.C.* § 12-117 is more specific than *I.C.* § 12-120(3), but provides little support for this contention. *See Respondent's Brief*, p. 13. Sanders relies on Tomich v. City of Pocatello, 127 Idaho 394, 400, 901 P.2d 501, 507 (1995) to show that *I.C.* § 12-117 is more specific than *I.C.* § 12-120. *Respondent's Brief*, p. 13. There is no discussion of *I.C.* § 12-117 nor *I.C.* § 12-120 in Tomich. Tomich only holds that *I.C.* § 6-918A is more specific and newer than *I.C.* § 12-121. Tomich, 127 Idaho at 400, 901 P.2d at 507. Interestingly, Tomich says nothing about the applicability of *I.C.* § 12-117, even though a city was involved as a party.[11]

Interestingly, Tomich gives insight as to what the Court looks at to determine whether a statute is more specific. With regard to *I.C.* §§ 12-121 and 6-918A, the Court stated "To the extent of any conflict between I.C. § 12-121 and I.C. § 6-918A, we apply I.C. § 6-918A. It is not only the later statute, but also a more specific statement of the legislature's intent about the award of attorney fees in *tort claims cases*." Tomich, 127 Idaho at 400, 901 P.2d at 507 (emphasis added). The Court applied *I.C.* § 6-918A because it was more specific about the type of case at issue. Applying this principle to this case, *I.C.* § 12-120(3) is the more specific statute, because it addresses contracts/commercial transactions, as opposed to generally describing any case involving a political subdivision. As the Court has held, *I.C.* § 12-117 is more specific over *I.C.* § 12-121 because the later is completely general—§ 12-121 applies to every case, regardless of the parties involved or type of claims included. *I.C.* § 12-117 has the same standard as § 12-121,

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[11] If the Court adopts Plaintiff's logic that cases involving political subdivisions are limited to fees under *I.C.* § 12-117 only, Tomich, like Beehler v. Fremont County, 145 Idaho 656, 658, 182 P.3d 713, 715 (Ct. App. 2008), will likely have to be determined to have been overruled by Brown v. City of Pocatello, 148 Idaho 802, 811-12, 229 P.3d 1164, 1173-74 (2010) (which holds that *I.C.* § 12-117 is exclusive as to *I.C.* § 6-918A).

but applies to certain parties. *I.C.* § 12-120(3), on the other hand, applies to a very specific type of case (contracts, commercial transactions, etc.). *Tomich* indicates that the specificity the Court looks at is the type of case at issue (tort claims, contract claims, etc.), as opposed to the parties involved. This is backed up in numerous cases where specific case-based attorney fee statutes apply over more general ones. *See Beehler v. Fremont County*, 145 Idaho 656, 658, 182 P.3d 713, 715 (Ct. App. 2008) (*I.C.* § 6-918A (tort cases involving governmental entities) is exclusive over *I.C.* § 12-117 (general cases involving governmental entities)); *Henry v. Taylor*, 152 Idaho 155, 267 P.3d 1270, 1276-78 (2012) (*I.C.* § 9-344(2) was held to be the exclusive attorney fee statute in a Public Records Act case, over *I.C.* §§ 12-121 and 12-117). The Board contends that if the Court finds *I.C.* §§ 12-120 and 12-117 to have irreconcilable conflicts, because *I.C.* § 12-120(3) dictates not only which parties it applies to but also what categories of claims (contract, commercial transaction, etc.), it should be deemed the more specific statute, and the Board should have been allowed to pursue fees under that statute.

Finally, Sanders' argues that the history of *I.C.* § 12-117 demonstrates the legislature's intent to make it exclusive. *Respondent's Brief*, pp. 13 – 14. The clearest statement of intent by a legislature is the plain language of a statute. *See State v. Rhode*, 133 Idaho 459, 463, 988 P.2d 685, 689 (1999) ("Legislative intent can be ascertained by applying rules of grammatical construction or by a plain-language interpretation of the statute."). There is no language in *I.C.* § 12-117 discussing exclusivity. By the plain language of *I.C.* § 12-120(3), it applies to "the state of Idaho or political subdivision thereof." The only way that Sanders' argument that *I.C.* § 12-120(3) is not applicable can be correct is if the Court ignores the plain language of *I.C.* § 12-120(3). This is not a reasonable canon of construction under any circumstance. *See Hillside*

Landscape Const., Inc. v. City of Lewiston, 151 Idaho 749, 753, 264 P.3d 388, 392 (2011). Therefore, Sanders' contention that the legislative intent of the statute to be exclusive is determined by its history (as opposed to by its language) is unsupported, and without merit, particularly where there is no assertion that the statute is ambiguous.

Based on the foregoing, the Board contends that if there is a conflict between *I.C.* §§ 12-120(3) and 12-117, 12-120(3) is the more specific statute, and should apply over 12-117. Therefore, Judge Norton abused her discretion by refusing to determine whether attorney fees were awardable under that statute.

C. BECAUSE THE BOARD AND THE DISTRICT ARE DISTINCT LEGAL ENTITIES, DIFFERENT FEE STATUTES MAY APPLY AND I.C. § 12-117 DOES NOT APPLY IN THIS SUIT AGAINST THE BOARD.

The Board has argued in the alternative that Sanders missed the mark in arguing that *I.C.* § 12-117 is the only applicable fee statute. The basis for this argument is that Sanders' claims for breach of contract are against the Board of Trustees of Mountain Home School District (as opposed to the District itself), which Board is not an entity identified or defined within the scope of *I.C.* § 12-117. Therefore that statute does not apply to this case. Sanders responds with several arguments, none of which should be persuasive.

First, Sanders argues, almost as an aside, that the Board did not present this argument below. *Respondent's Brief*, pp. 14 – 15. Such argument should not prevent this Court from addressing this issue, nor is it a basis for disregarding the Board's argument. Generally, the only time this Court refrains from addressing arguments made by counsel on appeal are when such arguments are made for the first time in the reply brief or at oral arguments. *See Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) ("this Court will not consider arguments raised for the

first time in the appellant's reply brief."); *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004) (same); *Robbins v. County of Blaine*, 134 Idaho 113, 115, 996 P.2d 813, 815 (2000) (issues raised for the first time at oral argument are not properly before the Court). The basis for this logic is that "A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief." *Suitts*, 141 Idaho at 708, 117 P.3d at 122.[12] In this case, Sanders has clearly had the opportunity to respond to the Board's argument (as it is contained within the Respondent's Brief), and therefore the issue is squarely before the Court.

Second, Sanders argues that this issue is form over substance. *Respondent's Brief*, p. 15. Unfortunately, this conclusion is incorrect. Sanders ignores the distinction made by Idaho statutes differentiating between the Board as an entity (governed by Chapter 5, Title 33, Idaho Code) and school districts as entities (governed by Chapter 3, Title 33, Idaho Code). Sanders attempts to show that her employment contract was between herself and the Board of Trustees by citing to *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995). *See Respondent's Brief*, p. 15. However, Sanders fails to cite a specific page or quote any language supporting this argument. In fact, *Brown* says nothing as to whether an employment contract between a teacher and a school district is "as a matter of law, between [the teacher] and the Board of Trustees", as Sanders would have the Court believe. *Respondent's Brief*, p. 15. The

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[12] It is clear that the Court will refuse to address new issues which have not been heard by the trial court. For example, a person may not raise a new affirmative defense on appeal. *See, e.g. Krempasky v. Nez Perce County Planning & Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010) (a party may not raise a due process issue before the appellate court if that party never raised the issue before the trial court); *Hayes v. State*, 146 Idaho 353, 357, 195 P.3d 712, 716 (Ct. App. 2008) (in criminal cases, issues not addressed to the trial court will not be addressed by the appellate court). These situations do not apply to this case, because the issue of attorney fees was squarely presented to the District Court, and this appeal is dealing with Judge Norton's denial of attorney fees to the Board under *I.C.* § 12-120(3). Thus, the Board may present each and every reason why it considers Judge Norton's ruling to be an abuse of discretion.

issues in *Brown* involved whether a particular board of trustees complied with a statute and whether an assistant superintendent had authority to enter an oral employment contract with a potential employee. *Brown*, 127 Idaho at 115 – 18. Neither of these issues resulted in a discussion of whether a Board of Trustees can have an employment contract with a teacher, nor do they relate to this case.

Statutory law is clear on this subject. The Board of Trustees makes the decision whether to enter the contract. *I.C.* § 33-513(1). However, there must be a written employment contract in a form approved by the state superintendent of public instruction. *Id.* Every written teacher's contract, including Sanders' contracts, contains essentially the following language:

> THIS CONTRACT, made this __ day of _____ year of ____, by and between _____ School District No. ____, _____, Idaho ("the District"), and _____ ("the Teacher").
>
> WITNESSETH:
> 1. The District hereby employs the Teacher pursuant to Section 33-514(2)(a), Idaho Code, for the duration of the _____ school year . . .[13]

The applicable language in Sanders' employment contract states, almost identically, as follows:

> THIS CONTRACT, made this 7th day of May year of 2007, by and between Mountain Home School District No. 193, Mountain Home, Idaho ("the District"), and **Terri M Sanders** ("the Teacher").
>
> WITNESSETH:
> 1. The District hereby employs the Teacher pursuant to Idaho Code § 33-515 for the duration of the 2007/2008 school year. . . .

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[13] This language is copied from the form teacher's contract prepared by the Idaho State Department of Education, with blanks intact. All teacher's contracts are available on the Idaho State Department of Education website. *See* http://www.sde.idaho.gov/site/educator_resources/contracts.htm (last checked Sept. 29, 2012). The Court may take judicial notice of these forms, as they are generally known and statutorily required within this Court's jurisdiction, and are capable of accurate and ready determination, as they are from a source (i.e. the State Department of Education) whose accuracy cannot readily be questioned. *See Brazier v. Brazier*, 111 Idaho 692, 700 (Idaho Ct. App. 1986) (overruled on other grounds, *Swope v. Swope*, 112 Idaho 974, 982 (1987). *See also State v. Doe*, 146 Idaho 386, 389, 195 P.3d 745, 748 (Ct. App. 2008) (the court allowed judicial notice to be taken of a city ordinance); *City of Lewiston v. Frary*, 91 Idaho 322, 325, 420 P.2d 805, 808 (1966) (acts of legislature must be given judicial notice, citing to *I.C.* § 9-101).

It is clear from the statute, and from the language of the contract itself, that Sanders was employed by the Mountain Home School District, not the Board. Though the Board may make employment decisions, the District is the separate and distinct entity which employs the teachers.

Sanders also relies on *Thomas v. State*, 16 Idaho 81, 100 P. 761 (1909) in support of her argument, stating that "this Court has recognized that an action brought against a board of trustees of a school district is an action against the state through its political subdivision." *Respondent's Brief*, p. 15. *Thomas* does not say this, nor does it in any way hold that suing a board is the same thing as suing the entity itself. The issue in *Thomas* was not whether suing the board was the same as suing the entity, but whether suing the board was the same thing as suing the state, an issue which is completely irrelevant to this case. First, as the Court recognized in *Thomas*, the specific Board being sued was for the Albion State Normal School, an entity whose specific statutory creation made it such that a suit could be brought against the State itself when the Albion Board allegedly breached a contract. *Thomas*, 100 P. at 762 – 63. Therefore, only because the specific statutes creating the Albion State Normal School allowed for suits against the State did the Court consider that a suit against the school could be a suit against the state. Frankly, this wasn't even the primary issue in *Thomas*. The essential question was whether the district court had jurisdiction to hear the case (as it was a case against the state), and the Supreme Court answered in the negative, as suits against the State, at that time, must have been brought in the Supreme Court. *Id.* at 762.[14] Regardless, the statutes which created the Albion School do not create other school districts in this state, and therefore this specific ruling does not establish that

[14] This determination was later overruled. *See Grant Const. Co. v. Burns*, 92 Idaho 408, 413, 443 P.2d 1005, 1010 (1968).

all suits against school boards are suits against the State itself.

A second issue with the *Thomas* case is that even if Sanders is correct that *Thomas* does apply, and this Court agrees that suing the Board is the same as suing the State[15], then Judge Norton still improperly denied fees under *I.C.* § 12-120(3). By its terms, *I.C.* § 12-117 only applies to actions involving "as adverse parties a state agency or a political subdivision and a person." *I.C.* § 12-117(1). Neither "political subdivision" nor "state agency" is defined to include the State of Idaho itself. *See I.C.* §§ 12-117(5)(b) and (5)(d); *I.C.* § 67-5201. On the other hand, *I.C.* § 12-120(3) quite specifically includes the "the state of Idaho or political subdivision thereof" in the definition of a party. Therefore, utilizing Sanders' own argument, if *Thomas* stands for the proposition that a suit against a school board for breach of contract is the same as a suit against the state for breach of contract, then the proper attorney fee statute is *I.C.* § 12-120(3), and Judge Norton committed a breach of discretion by refusing to allow fees under the appropriate statute.

Though Sanders alleges that numerous other cases show that suits against the governing body of a political subdivision are treated as if they were a suits against the political subdivision itself, Sanders cannot identify one case or statute holding that a school board and a school district must be treated as the same entity for all intents and purposes, including attorney fee statutes. This is because there is no such case. The statutes make it clear that the two entities (the Board and the district) are distinct. Sanders could have sued the Mountain Home School District for breach of her employment contract[16] as it was her employer, but she did not do so. Therefore, she

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[15] Since *Thomas* did not hold that suing a Board is the same thing as suing the entity itself, the only issue which would be relevant would be what attorney fee statutes are available if suing the Board was the same as suing the State itself.

[16] *See I.C.* § 33-301 (School districts may sue or be sued).

is not suing a political subdivision or state agency, and *I.C.* § 12-117 does not apply. The applicable attorney fee statute is *I.C.* § 12-120(3), and the Board requests that this Court determine that Judge Norton abused her discretion in determining otherwise.

D. THE BOARD DID NOT APPEAL JUDGE NORTON'S RULING THAT FEES WERE NOT ALLOWED UNDER IDAHO CODE § 12-117.

In her brief, Sanders argues that this Court should affirm the "District Court's factual finding that Plaintiff Sanders' case had a reasonable basis in fact and law." *Respondent's Brief*, pp. 16 – 17. The logic behind this argument appears to be that attorney fees can only be awarded under *I.C.* § 12-117 if the Court is left with a belief that the "nonprevailing party acted without a reasonable basis in fact or law." *I.C.* § 12-117(1). However, the Board has never challenged nor appealed Judge Norton's determination that fees were not available under *I.C.* § 12-117. *See Appellant's Brief*, p. 5 (identifying that the issues on appeal are only whether *I.C.* § 12-120(3) is available to the Board under the circumstances of this case, and whether *I.C.* § 12-117 is the exclusive source of attorney fees where the claim at issue is a breach of employment contract claim). Because the Board has never requested that this Court reconsider Judge Norton's decision in denying attorney fees under *I.C.* § 12-117, Sanders' request that the Court affirm such finding is moot.

E. THE BOARD IS ENTITLED TO ATTORNEY FEES UPON APPEAL.

The Board has requested attorney fees upon appeal. Sanders has failed to respond to this request in any way (except to ask for attorney fees herself upon appeal). Other than pointing out that the same counsel who worked on this present case also appeared before this Court in *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 226 P.3d 1277 (2010), reh'g

denied (Mar. 17, 2010)[17], Sanders has failed to in any way address most of the Board's arguments. By the same logic, Sanders' counsel was the same counsel who appeared in *Willie v. Bd. of Trustees*, 138 Idaho 131, 132, 59 P.3d 302, 303 (2002)[18], and should be intimately aware of the ruling in that case (and also aware that *Willie* was in no way discussed in or explicitly overruled by *Potlatch*). Therefore, to the extent that *Willie* is still good law (it has been recently cited as good law and has never been explicitly overruled), Sanders has no reasonable argument that the Board should not be awarded fees on appeal under *I.C.* § 12-120(3). Further, to the extent that the Board is a party to this action (as opposed to the District itself), there was no reasonable basis in law to argue that it cannot obtain attorney fees under *I.C.* § 12-120(3).

Finally, to the extent that Sanders in no way responded to the Board's request for attorney fees, she has waived any argument to the contrary. *See Sparks v. State*, 140 Idaho 292, 298, 92 P.3d 542, 548 (Ct. App. 2004) ("A party waives an issue on appeal if either authority or argument is lacking."). Therefore, the Board requests that it be granted attorney fees on appeal.

II. RESPONSE TO COUNTERAPPELLANT'S BRIEF

A. THE BOARD'S STATEMENT OF THE CASE.

The Board generally agrees with Plaintiff Sanders's statement of the case, but disagrees with a number of statements. Sanders makes a number of contentions in her brief that are misleading. For example, Sanders states that "there was no claim in the Complaint related to the grievance process." *Respondent's Brief*, p. 1. While this statement is correct, it fails to acknowledge that even though Sanders did not include a claim in the Complaint related to

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17 *See Respondent's Brief*, p. 21.

18 John Rumel argued before the Supreme Court in the *Willie* case. Mr. Rumel also argued *Potlatch*. He was the attorney of record in this case as well, until he substituted out and was replaced by Paul Stark in June, 2011. *R. Vol. I* (Register of Actions).

alleged deficiencies in the grievance process, the Board was still obligated to defend against such claims. In Sanders' Motion for Summary Judgment, she argued "that the Board failed twice to consider and resolve her grievance." *R. Vol. I*, p. 32. Judge Greenwood addressed this issue (and denied this claim), noting that the "Defendants strenuously object to injecting the issue of failure to follow the grievance process." *R. Vol. I*, p. 32. Thus, even though Sanders failed to include in the Complaint a claim related to the grievance process (which grievance process included the non-binding arbitration), the Board was obligated to defend such a claim. *See R. Vol. I*, p. 32. Therefore, there can hardly be an implication that the issue of the grievance process was not raised before the District Court.

Next, Sanders contends that the District "claimed it was asking for only half of its arbitration costs." *Respondent's Brief*, p. 2. The record is clear that the Board only sought its costs from the non-binding arbitration as discretionary costs pursuant to *I.R.C.P.* 54. *See R. Vol. I*, pp. 63, 102. This amount was $2,304.50, which is what Judge Norton awarded as discretionary costs. *R. Vol. I*, p. 143.

Finally, it should be noted that the grievance process followed by the Board, including the non-binding arbitration, was a result of the Collective Bargaining Agreement between the District and the Mountain Home Education Association. *See Clerk's Record Exhibits*, Ex. 102 (p. 15). Had the Board failed to engage in the non-binding arbitration, there is little doubt but that the Board would have been facing an explicit claim for violation of the grievance process.

B. THOUGH THE ARBITRATOR'S FEES WERE QUESTIONABLY AWARDED AS DISCRETIONARY COSTS BY JUDGE NORTON, THE COURT SHOULD AFFIRM THE AWARD ON OTHER GROUNDS.

In seeking the arbitration costs paid by the Board related to Sanders' grievance, the Board

only sought to recoup the half of the arbitrator's total bill which the Board was responsible for paying and did pay. *R. Vol. I*, pp. 63 – 64 (showing that the Board's total portion of the arbitrator's bill was $2,304.50). Sanders alleges that the District Court "found, contrary to the evidence, that the District had paid $4,609.00 and ordered payment of what it believed to be one-half of the amount paid by the District." *Respondent's Brief*, p. 2. This appears to be correct. The Order Granting Costs and Denying Attorney Fees states "The affidavit of costs reveals that the School District paid total arbitration costs of $4,609.00 so the court will award half of that amount, or $2,304.50 as discretionary costs." *R. Vol. I*, p. 139. In finding this, Judge Norton appears to have mistakenly concluded that the Board paid for the entire arbitration, and was just seeking to recoup half of those fees. If this is the basis for Judge Norton's finding, then the Board has no option but to agree that Judge Norton's ruling on this issue should be reversed and remanded so that the parties may correct her mistaken assumptions and allow her to again determine whether the arbitration costs are discretionary costs.

That being said, just because Judge Norton awarded the arbitration costs on a mistaken premise does not mean that the arbitration costs cannot be awarded as discretionary costs. Sanders contends that the costs related to arbitration are not available because they must have been dealt with as directed by the Uniform Arbitration Act. *See Respondent's Brief*, p. 18. There are two problems with this argument. The first, and most important, is that the Uniform Arbitration Act does not apply to this case. The act specifically states that "This act does not apply to arbitration agreements between employers and employees or between their respective representatives (unless otherwise provided in the agreement)." *I.C.* § 7-901. There is little doubt that the Collective Bargaining Agreement between the Mountain Home School District and the

Mountain Home Education Association, which contains the arbitration requirements, constitutes an "arbitration agreement[] between employers and employees or between their respective representatives." *See Clerk's Record Exhibits*, 102 (pp. 15 – 16). There is nothing in the arbitration clauses in the Collective Bargaining Agreement indicating that it is to be governed by the Uniform Arbitration Act. *Id.* Therefore, all of Sander's arguments based upon the Uniform Arbitration Act are without foundation.

Second, to the extent that Sanders relies on *I.C.* § 7-910 and *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 403, 913 P.2d 1168, 1173 (1996), such authority is inapposite. Even if the Uniform Arbitration Act were to be applied to this case, neither the Board nor Sanders could have obtained an award of costs from the arbitrator. Under the terms of the arbitration agreement, "The arbitrator's recommendation *shall be advisory* and made to the Board of Trustees of School District 193 and the grievant." *Clerk's Record Exhibits*, 102 (p. 16) (emphasis added). Even if the arbitrator had awarded costs or fees, it would not have been binding. Therefore, the only way arbitration costs could be allowed in this case would be as part of the resulting lawsuit.

This Court has, in the past, affirmed a District Court ruling on different grounds than those stated by the District Judge. *See Martel v. Bulotti*, 138 Idaho 451, 453, 65 P.3d 192, 194 (2003) ("This Court may uphold decisions on alternate grounds from those stated in the findings of fact and conclusions of law on appeal."). The Board contended, and still contends, that due to the exceptional nature of the non-binding arbitration agreement, there is a possible basis for the District Court to award the arbitration fees as discretionary costs pursuant to *I.R.C.P.* 54(d)(1)(D). Pursuant to that section, the costs were necessary (the arbitration was requested by

Sanders, and therefore the District had to comply), reasonable (the Board only seeks the amount it paid, which is under $2,500 for a full day arbitration), exceptional (had the Board not engaged in the non-binding arbitration, it would have been sued for violation of the Collective Bargaining Agreement), and "should in the interest of justice be assessed against" Sanders. *I.R.C.P.* 54(d)(1)(D). *See also R. Vol. I*, pp 104 – 05, 126 - 27. Therefore, the Board requests that if this Court does not see fit to affirm the award of arbitration fees as discretionary costs on the grounds stated herein, that the Court return the issue to Judge Norton to allow for "express findings as to why [the] discretionary costs should or should not be allowed." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

To that end, there is no basis (as Sanders would have this Court conclude) to deny the request for discretionary costs outright. As discussed above, such award would not be barred by the Uniform Arbitration Act since the arbitration agreement at issue is not covered by the act. Further, neither *I.C.* § 12-101 nor *I.R.C.P.* 54(d) forbid an award of costs for a non-binding arbitration that lead to a lawsuit. *I.C.* § 12-101 only states that costs shall be awarded as allowed by the rules, and *I.R.C.P.* 54(d) says nothing about what can or cannot be discretionary costs (instead it only looks at the qualities of the costs to determine whether they can be awarded, *see I.R.C.P.* 54(d)(1)(D)). Further, there is no definition in *I.C.* § 12-101 as to what a "civil trial or proceeding" is, and such term(s) could easily be construed to include precursor steps to a lawsuit (such as mandatory non-binding arbitration). It was Sanders herself who attempted to interject the alleged deficiencies of the grievance procedure into the lawsuit (even though no such claim was contained in the Complaint). *See R. Vol. I*, p. 32. Therefore, Sanders should not be able to attempt to sidestep the costs that resulted from her actions.

C. SANDERS IS NOT ENTITLED TO ATTORNEY FEES UPON APPEAL UNDER *I.C.* § 12-117 BECAUSE THERE ARE CLEAR LEGAL BASES FOR THE BOARD'S REQUEST FOR FEES UNDER *I.C.* § 12-120.

Plaintiff Sanders contends that she is entitled to attorney fees on appeal pursuant to *I.C.* § 12-117. *Respondent's Brief*, p. 21. This is incorrect for two reasons. First, under the plain language of *I.C.* § 12-117, attorney fees are only allowed to the prevailing party. *I.C.* § 12-117(1). Plaintiff Sanders in no way can be considered the prevailing party, as judgment was entered on behalf of the Board, and Plaintiff Sanders has obtained no relief which she has sought.

Second, under *I.C.* § 12-117 attorney fees may only be awarded if the Court "finds that the nonprevailing party acted without a reasonable basis in fact or law." *I.C.* § 12-117(1). The Board contends that there is significant basis for its arguments. Though (as Sanders points out repeatedly) there are numerous cases holding that *I.C.* § 12-117 is exclusive to those entities to which it applies, none of those cases specifically holds that *I.C.* § 12-117 is exclusive over *I.C.* § 12-120. There are at least five case allowing attorney fees in contract cases to governmental entities under *I.C.* § 12-120(3).[19] At least two of these cases have been decided in the last twelve months. *See* Sadid and Noak, supra. In addition, various political subdivisions have had other sections of *I.C.* § 12-120 applied to them, allowing awards of attorney fees. *See* Scott Beckstead Real Estate Co. v. City of Preston, 147 Idaho 852, 216 P.3d 141 (2009) (allowing attorney fees to the City under *I.C.* § 12-120(1)).

Based on this apparent conflict, there is sufficient basis for the Board to argue that it is entitled to attorney fees under *I.C.* § 12-120 to prevent the conclusion that the Board's argument is "without a reasonable basis in fact or law." City of Osburn v. Randel, 152 Idaho 906, 910, 277

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[19] *See* Clark, Willie, Huyett, Sadid, and Noak, *supra*.

P.3d 353, 357 (2012). Therefore, the Board contends that Sanders has not adequately shown that the Board's request for fees pursuant to *I.C.* § 12-120(3) is unreasonable or without foundation, and Sanders should not be granted attorney fees on appeal.

III. CONCLUSION

Based on the foregoing, the Board requests that this Court reverse Judge Norton's decision to disallow fees under *I.C.* § 12-120(3). Also, as there has been no objection to the reasonableness of the requested fees, the Board also requests that this Court allow fees in the requested amount, and also allow reasonable attorney fees on appeal. Finally, the Board agrees with Sanders' contention that Judge Norton awarded arbitration costs as discretionary costs on a mistaken premise, and requests that this Court return the issue to Judge Norton to determine whether such costs are available under the facts of this case.

RESPECTFULLY SUBMITTED this 30th day of October, 2012.

ANDERSON, JULIAN & HULL LLP

By _____
Brian K. Julian, Of the Firm
Attorneys for Defendant/Appellant/Cross Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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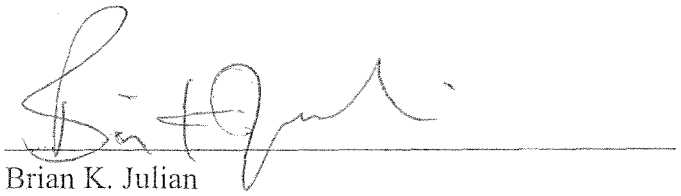

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